A

Ling Ing Keat & Ors v Martina bt Pg Ismail & Ors

B COURT OF APPEAL (KOTA KINABALU) — CIVIL APPEAL NO S-02(W)-1553–09 OF 2015
ZAWAWI SALLEH, ABANG ISKANDAR AND AHMADI ASNAWI JJCA
9 JANUARY 2017

C *Land Law — Sale of land — Illegality — State government offered alienation of land to defendants — Defendants sold land by using forged documents to plaintiffs prior to issuance of title — Defendants sold land to seventh defendant after title of land issued by state government — Plaintiffs commenced action against defendants for specific performance — Whether agreement void — Whether doctrine of severability applicable — Whether plaintiffs had better equity*

D

The first to sixth defendants ('the defendants') were offered alienation of a piece of land ('the said land') located in Kota Kinabatangan by the State Government of Sabah vide a letter of offer dated 11 July 2016 ('the offer letter'). It must be noted that the offer letter provided that the offer of alienation of the said land shall not be assigned or dealt with in any manner by way of power of attorney or by any other means. Nevertheless, in year 2009, the defendants entered into a sale and purchase agreement of the said land with the plaintiffs ('the plaintiffs' agreement'). Subsequently, in year 2012, when the state government issued the title of the said land, the defendants again entered into a sale and purchase agreement of the said land with Bameda Plantations Sdn Bhd ('the seventh defendant'). Consequently, the plaintiffs entered caveat ('the said caveat') on the said land and subsequently commenced an action in the court below for specific performance against the defendants. In response, the seventh defendant filed a counterclaim against the plaintiffs for removal of the said caveat. The High Court dismissed the plaintiffs' claim and allowed the counterclaim by the seventh defendant, hence the present appeal. The defendants' case was that the plaintiffs' agreement was void because of the used of forged powers of attorney by two of the defendants. On the other hand, the plaintiffs submitted that the doctrine of severability ought to apply in the present case and that such a doctrine could save the other covenants in the plaintiffs' agreement. There was also an issue of which of the parties had a better equity.

I

Held, affirming the learned High Court judge's decision and dismissing the appeal with costs of RM10,000 subject to allocator:

(1) The plaintiffs' agreement was entered into in violation of the offer letter. The dealing done under the plaintiffs' agreement was also in clear breach

of the offer letter. None of the defendants had the capacity in law, to deal with the said land as was expressly stated in the offer letter. Thus, the plaintiffs' agreement was void (see paras 15 & 18–19).

(2) Based on the evidence, the plaintiffs' agreement was entered by using forged Sandakan Syariah Court orders. It matters not one bit that the purchasers, being the plaintiffs that they were not privy to the forgery, the transaction would be effectively struck down as being bad on account of the used of the forged documents (see paras 21–23).

(3) The court agreed with the finding of the learned trial judge that there was nothing in the plaintiffs' agreement that provided for a provision of severability, thus, in the present case, severability could not in law, be justified and the plaintiffs' agreement was therefore incapable of salvation. Further, the plaintiffs' agreement was tainted with forged documents, hence the doctrine of severability had no application (see paras 26, 28 & 30).

(4) The agreement between the first to sixth defendants with the seventh defendant did not suffer from any defect which may have tainted it in any way so as to deny it of its bona fides. In the circumstances, it was clear, on balance, where the better equity had tilted in favour of. Definitely, it was not on the side of the plaintiffs. They were dealing with a piece of land which they knew was not allowed to be dealt with in any way by the state authority, as per the offer letter. They could not be heard to seek for an equitable relief when in fact their hands were less than clean. As is trite, the courts will not assist such litigants (see para 31).

[Bahasa Malaysia summary

Defendan-defendan pertama sehingga keenam ('defendan-defendan') ditawarkan pemindahan milik sebidang tanah ('tanah tersebut') yang terletak di Kota Kinabatangan oleh Kerajaan Negeri Sabah melalui surat tawaran bertarikh 11 Julai 2016 ('surat tawaran tersebut'). Ia mesti diberi perhatian bahawa surat tawaran memperuntukkan bahawa tawaran pemindahan milik tanah tersebut tidak akan diserahkan atau diuruskan dalam apa-apa cara melalui surat kuasa wakil atau melalui apa-apa cara yang lain. Walau bagaimanapun, pada tahun 2009, defendan-defendan memasuki perjanjian jual beli tanah tersebut dengan plaintif-plaintif ('perjanjian plaintif-plaintif'). Kemudiannya, pada tahun 2012, apabila kerajaan negeri mengeluarkan hak milik tanah tersebut, defendan-defendan sekali lagi memasuki perjanjian jual beli tanah tersebut dengan Bameda Plantations Sdn Bhd ('defendan ketujuh'). Akibatnya, plaintif-plaintif memasukkan kaveat ('kaveat tersebut') ke atas tanah tersebut dan kemudiannya memulakan tindakan di Mahkamah Tinggi bagi pelaksanaan spesifik terhadap defendan-defendan. Dalam menjawab, defendan ketujuh memfailkan tuntutan balas terhadap plaintif-plaintif bagi pemotongan kaveat tersebut. Mahkamah Tinggi menolak tuntutan

plaintif-plaintif dan membenarkan tuntutan balas oleh defendan ketujuh, maka rayuan ini. Kes defendan-defendan adalah bahawa perjanjian plaintif-plaintif adalah batal kerana penggunaan surat kuasa wakil yang palsu oleh dua daripada defendan-defendan tersebut. Sebaliknya, plaintif-plaintif berhujah bahawa doktrin pengasingan kuasa patut diguna pakai di dalam kes ini dan bahawa doktrin sedemikian boleh menyelamatkan perjanjian-perjanjian lain di dalam perjanjian plaintif-plaintif. Juga terdapat isu di mana pihak-pihak mempunyai ekuiti yang lebih baik.

Diputuskan, mengesahkan keputusan hakim Mahkamah Tinggi yang bijaksana dan menolak rayuan dengan kos sebanyak RM10,000 tertakluk kepada alokatur:

(1) Perjanjian plaintif-plaintif dimasukkan dengan melanggar surat tawaran tersebut. Pengurusan yang dibuat di bawah perjanjian plaintif-plaintif juga jelas melanggar surat tawaran. Tidak seorang pun daripada defendan-defendan berkapasiti dari segi undang-undang, untuk berurusan dengan tanah tersebut seperti yang dinyatakan secara jelas di dalam surat tawaran. Oleh itu, perjanjian plaintif-plaintif adalah batal (lihat perenggan 15 & 18–19).

(2) Berdasarkan ke atas keterangan, perjanjian plaintif-plaintif dimasuki dengan menggunakan perintah-perintah Mahkamah Syariah Sandakan yang palsu. Adalah tidak penting, pembeli-pembeli, sebagai plaintif-plaintif bahawa mereka tidak privi kepada pemalsuan, transaski akan secara efektif dibatalkan kerana salah atas penggunaan dokumen-dokumen palsu tersebut (lihat perenggan 21–23).

(3) Mahkamah bersetuju dengan dapatan hakim perbicaraan yang bijaksana bahawa tidak terdapat apa-apa di dalam perjanjian plaintif-plaintif yang memberikan peruntukan pengasingan kuasa, oleh itu, dalam kes ini, pengasingan kuasa tidak boleh dari segi undang-undang, dijustifikasikan dan perjanjian plaintif-plaintif oleh itu tidak dapat diselamatkan. Selanjutnya, perjanjian plaintif-plaintif dicemar dengan dokumen-dokumen palsu, maka doktrin pengasingan kuasa tidak beraplikasi (lihat perenggan 26, 28 & 30).

(4) Perjanjian di antara defendan-defendan pertama hingga keenam dengan defendan ketujuh tidak mengalami apa-apa kecacatan yang mungkin mencemarkannya dalam apa-apa cara untuk menafikan bona fides nya. Dalam keadaan, adalah jelas, atas imbangan, adalah berpihak kepada ekuiti yang lebih baik. Sesungguhnya, ia bukan bagi pihak plaintif-plaintif. Mereka adalah berurusan dengan sebidang tanah yang mereka tahu tidak dibenarkan berurusan dengannya dalam apa-apa cara sekalipun oleh pihak berkuasa negeri, seperti surat tawaran tersebut. Mereka tidak boleh didengar untuk memohon relif ekuiti apabila mereka juga salah. Adalah nyata, mahkamah tidak akan membantu

litigan-litigan sedemikian (lihat perenggan 31).]

Notes

For cases on illegality, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5163–5164.

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188; [2015] 8 CLJ 1173, FC (refd)

Legislation referred to

Land Ordinance (Cap 68) ss 4, 88

Appeal from: Civil Suit No SDK-22–42/8 of 2013 (High Court, Sandakan)

S Vanugopal (S Vanugopal & Partners) for the appellants.
Thomas Ting Shu Kiong (SK Ting & Co) for the seventh respondent.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] A piece of land was offered for alienation on application, by the Sabah State Government on 11 July 2006, to six individuals namely Rahinah bt Anduman ('Rahinah'), Indarah bt Rakim ('the second defendant'), Sainah bt Angkat ('the third defendant'), Jakarullah bin OKK Ismail ('the fouth defendant'), Abd Hassan Napiah ('the fifth defendant') and one Sitimah bt Damit ('Sitimah'). The said land was held under CL 255340599 under PT 96090624 at Sungai Millian in the District of Tongod, Kota Kinabatangan measuring 48.53 hectares/119.920 acres, in size.

[2] In 2009, some three years later, the first to sixth defendants sold the land to Ling Eng Keat, Ling Eng Shoo, Ling Wah Fong, Ling Wah King, and Ling Wah Joo ('the plaintiffs') vide a sale and purchase agreement dated 19 August 2009 ('the plaintiff's agreement'). A point to note is that Martina bt Pg Ismail ('the first defendant') executed the plaintiff's agreement as the administrix of the estate of the deceased Rahinah bt Anduman and Abdul Malik bin Maja ('the sixth defendant') executed the plaintiff's agreement as the administrator of the estate of Sitimah.

[3] The title to the said land was finally issued under CL 255340599 and registered in the name of Rahinah, the second to fifth defendants, and Sitimah

on 1 June 2012. At this point, it is worth noting that before the material time, the said land was offered for alienation only, as per para 4 of the letter of offer, which prohibited assignment or any form of dealings on the land in question, by way of power of attorney or otherwise whatsoever.

[4] Pursuant to cl 2(a) of the plaintiff's agreement, the sum of RM42,000 was paid by the plaintiffs to the first to sixth defendants and a further sum of RM7,000 was paid in advance, subsequently.

[5] Unknown to the plaintiffs, the first to fifth defendants together with Sitimah, entered into sale and purchase agreement with Bameda Plantations Sdn Bhd ('Bameda Plantations') on 4 June 2012 ('Bameda agreement').

[6] As a result of that, the plaintiffs, had subsequently registered a caveat on the said land on 4 July 2012.

[7] The plaintiffs then commenced an action against the first to sixth defendants for specific performance of plaintiffs' agreement of 2009, among others, in that the defendants specifically perform, undertake, and fulfil their obligations under the said 2009 plaintiff's agreement.

[8] Bameda Plantations Sdn Bhd was added as the seventh defendant/intervener pursuant to a court order dated 4 November 2014.

[9] The defendants' defended the claim by asserting that the agreement is null and void ab initio by virtue of s 88 of the Land Ordinance (Sabah). The land was not alienated to the second to fifth defendants when the plaintiffs' agreement was entered into in 2009. It was entered into merely based on the letter of offer to alienate dated 11 July 2006.

[10] The seventh defendant filed a counterclaim against the plaintiffs and the first to sixth defendants for the caveat lodged by the plaintiffs on the said land to be removed on the ground that the plaintiffs knew and/or ought to have known that the said land could not have been lawfully sold to the plaintiffs.

[11] On the 14 August 2015, the High Court dismissed the plaintiffs' claim and allowed the counterclaim by the seventh defendant, thus this appeal before the Court of Appeal by the plaintiffs.

THE APPEAL

[12] During appeal before us, the plaintiff put before us the following questions for determination, namely:

(a) whether the learned High Court judge misconceived the doctrine of severability when he held that the doctrine was inapplicable to the instant case because:

(i) two of the defendants had used forged documents to execute the plaintiff's agreement of 2009 and that therefore the whole agreement was tainted with illegality; and

(ii) there are no provisions in the plaintiff's agreement of 2009 for severance in the event any of the parties is found to be a fraud;

(b) whether the learned High Court judge erred when he held that there are no provision in the agreement for severance of covenants or provisions from the other parts?

(c) whether the learned High Court judge erred when he held that the two falsified Perintah Perlantikan Pentadbir would nullify the entire agreement?

(d) whether the learned High Court judge erred when he held that the plaintiff's agreement contravened s 88 of the Sabah Land Ordinance? and

(e) whether the learned High Court judge erred when he held that Bameda Plantations had a better equity than the plaintiff?

OUR FINDINGS

[13] For clarity, we will refer to the parties in this appeal as they were described in the High Court proceedings. We had occasion to peruse through the grounds of judgment of the learned trial judge, the cause papers and of course the notes of proceedings and the various documents in the records of appeal. Upon such exercise, we were of the view that the case for the plaintiffs would hinge mainly on the issue of illegality, if proven, and how it would impact on the validity of their claim. In that context, the issue on the doctrine of severability would be discussed.

[14] Now, from the records of appeal we could see that the defendants were offered alienation of the said land by the State Government of Sabah vide a letter of offer dated 11 July 2006. Then in 2009, they entered into the plaintiff's agreement with the plaintiffs, whereby it was stipulated therein that the said land be sold to the plaintiffs, for a stated sum of consideration. On 1 June 2012, the state government had issued the title to the said land in the names of the first to sixth defendants. On 4 June 2012, the defendants entered into a sale and purchase agreement with Bameda Plantations, the seventh defendant in this case. Then this suit was filed by the plaintiffs against the first to sixth defendants for specific performance of the plaintiff's agreement. As an interested party, Bameda Plantations was brought in as the seventh defendant.

It had a counterclaim against the plaintiffs for the removal of the caveat which the plaintiffs had lodged over the said land in July 2012 in a purported exercise to protect its perceived apparent interest in the said land.

[15] From that brief narration, it was clear to us that the plaintiff's agreement of 2009 was entered into in violation of the letter of offer dated 11 July 2006. A reference by us to the para 4 of the letter of offer would reveal the following stipulation:

> This offer shall not be assigned or dealt with in any manner by way of Power of Attorney or by any other means.

[16] The Sabah Land Ordinance (Cap 68) defines 'dealing' under s 4 therein, as follows:

> 'dealing' means any transaction of whatever nature by which land is affected under this Ordinance.

[17] We noted that the learned trial judge did allude his mind to this factual circumstance in his grounds of judgment. This can be seen at p 9 of his grounds of judgment, where he had said:

> Therefore, not only that the power of attorney given to the plaintiffs was not allowed by the said letter of offer but it was also bad in law as it was given pursuant to forged Syariah Court orders.

[18] On the ground that the dealing done by the first to sixth defendants with the plaintiffs via the plaintiff's agreement, it was a clear breach of the terms of the letter of offer dated 11 July 2006, specifically of para 4 that expressly provided as follows:

> This offer shall not be assigned or dealt with in any manner by way of Power of Attorney or by any other means.

[19] As such, the plaintiff's agreement was made between the respective parties in contravention of the express terms of the letter of offer dated 11 July 2006. Clearly, the first to sixth defendants had no authority to deal with the said land with the plaintiffs. It was done against public policy, bordering on illegality. In other words, none of the said defendants had the capacity in law, to deal with the said land as was expressly stated in the letter of offer. Two things were clear in respect of the letter of offer. First, it was just a letter of offer to alienate which the first to sixth defendants accepted on condition as stated as terms therein. Second, no title to the said land was issued at the time of issue of the letter of offer and neither was there a title issued to the said land at the date of signing of the plaintiff's agreement on 19 August 2009. The title was only issued on 1 June 2012. In other words, the letter of offer prohibited expressly

any dealing with the said land by any means, including by way of use of a power of attorney. As such, the plaintiff's agreement was void on such account.

[20] In any event, the case was argued on the basis that the plaintiff's agreement was void because of the use of forged powers of attorney by two of the defendants, namely Martina bt Pg Ismail (the first defendant) and Abdul Malik bin Maja (the sixth defendant).

[21] In this regard, we found that the learned trial judge had found as a fact that those circumstances pertaining to forgery were established by the evidence led before him. In this case, the 2009 plaintiff's agreement was entered into by the said two persons by using forged Sandakan Syariah Court orders whose falsity was confirmed by Mohd Nur Assyarif bin Mohd Saad ('DW2'), an Assistant Registrar of the Sandakan Syariah Court. The evidence of DW2 in the trial court below was clear. The record shows the following evidence having been testified:

> Merujuk Salinan perintah di muka surat 4 nama pemohon dan nama si mati bukanlah merujuk kepada nombor kes di dalam rekod Mahkamah Syariah Sandakan. Salinan perintah di muka surat 5 tiada sama sekali di dalam rekod Mahkamah. Ini bermakna kedua-dua perintah tersebut tidak pernah dikeluarkan oleh pihak Mahkamah Syariah Sandakan.

[22] Based on the above quoted testimony of DW2, the learned trial judge found as a fact that the plaintiff's agreement and the power of attorney had been executed by persons 'who misrepresented their authority by producing forged Syariah Court Orders'. As such, it was his finding in law that, on the recent authority of the Federal Court decision in *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188; [2015] 8 CLJ 1173 a forged power of attorney could not give rise to a valid title in law and that the Sabah Land Ordinance does not seek to give validity to such a title, even to a bona fide purchaser without notice. In other words, it matters not one bit that the purchasers, being the plaintiffs in this appeal before us, that they were not privy to the forgery. The transaction would be effectively struck down as being bad, on account of the forged documents used to effect the transaction via the plaintiff's agreement. The learned trial judge had also ruled that the fact that only two owners in the said land had fraudulently signed the plaintiff's agreement would not detract from the fact that the plaintiff's agreement was entered for the whole undivided land and that the forgery had tainted that entire plaintiff's agreement and it could never confer a valid interest or title in law, in respect to the said land to the plaintiffs. The letter of offer, via para 4 therein, prohibited any kind of dealings on the said land by the defendants to anyone, either by way of a power of attorney or by any other means. In other words, the defendants had no title in the said land. We noted that the learned trial judge had stated in his grounds of judgment that the Latin maxim of *nemo*

dat quod non habet applied to the factual circumstance in the case before him, namely no one can give a better title than he himself possesses.

[23] With respect, we found the findings made by the learned trial judge to be sound in law. They were founded upon concrete evidence before him as well as the authoritative pronouncement by the apex court in relation to the legal position on the issue of the effect of the use of forged document to effect the transaction between the parties that sought to transfer the interest in the said land to the plaintiffs.

[24] Learned counsel for the plaintiffs had also submitted that the doctrine of severability ought to apply in this case and that such a doctrine could save the other covenants in the plaintiff's agreement.

[25] What is exactly the so-called doctrine of severability in the law of contract? The word severability has its genesis from the Latin word 'salvatorius' and in the context of severability in the law of contracts, it refers to a provision in a contract which stipulates that in the event that parts of the contract are found to be illegal or otherwise unenforceable, then the remainder of the contract should still apply. As the word suggests it seeks to salvage the rest of the contractual provisions although certain other terms of the same contract are found to be unenforceable. Therefore, the court will need to look at the contract document itself to see whether such a provision does exist which would then allow the court to excise the offending provisions so that the rest of the contractual terms continue to operate for the benefits of the contracting parties.

[26] Reverting to the factual matrix of this case before us, we noted that the learned trial judge had studied the plaintiff's agreement of 2009 and he found that there was nothing in the said plaintiff's agreement that provided for such a provision for severability. As such, he had concluded as follows (see p 10 of the GOJ):

> Close scrutiny of the plaintiffs' agreement will reveal that the said agreement does not provide for the transfer of parts or in this case 5/6 portion of the said land. There is no provision to provide for the sale or transfer of parts of the said land in the plaintiffs' agreement in the event of default or defective title by the other vendors. Hence, this was never the intention of the parties.

[27] The learned trial judge then cited the Federal Court decision in the case of *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 where the apex court reiterated the cardinal principle of commercial law that the courts will not rewrite a contract by introducing terms into it just that by so doing, a reasonable interpretation may be made of it. Having this principle at the forefront of his mind, the

learned trial judge had concluded on this issue as follows, at p 10 of his grounds of judgment thus:

> We have to bear in mind that the plaintiffs agreement is for the sale of the whole undivided piece of land. If the court allows specific performance only on 5/6 portions of the said land it would tantamount as rewriting the plaintiffs' agreement.

[28] That being the case, severability could not in law, be justified. The plaintiffs' agreement was incapable of salvation. With respect, we were in agreement with the learned trial judge in his reasoning as well as his finding on the issue of severability.

[29] In the circumstances, we found no reason to fault the learned trial judge in coming to the conclusion that he did. In fact, the plaintiffs attempted to extend the applicability of the doctrine of severability to the parties to the plaintiff's agreement. It had appeared in the alternative pleadings of the plaintiffs that as the forgery only involved two persons, the plaintiff's agreement could be salvaged by excising the two persons from consideration of the said agreement. To this, the learned trial judge had disagreed. He had his reason. It is this. It involved the capacity of the two persons to enter into the said agreement. As their purported authority to act was obtained through fraudulent means, it affected their respective capacity to execute the plaintiff's agreement as holders of the letter of offer dated 11 July 2006 in respect of the said land. Secondly, it involved the *whole undivided* shares in the said land. Severability does not relate to capacity of the parties to enter into a contract. As such, in the context of this case, when a party to a contract was found to be incapacitated by law, the whole contract becomes, in law void ab initio, as the land involved the whole undivided shares of the respective defendants.

[30] Suffice for us to state here that there was no cogent reason for us to disturb the learned trial judge's handling of the issue on the severability or otherwise of the plaintiff's agreement. We endorsed his finding. In fact, as the plaintiff's agreement was tainted with forged documents, to wit the power of attorney, it is unenforceable in law. In such a circumstance, the doctrine of severability has no application.

[31] On the issue of which of the parties had a better equity, we were of the considered view that this would be a non-starter. We said so because Bameda Plantations Sdn Bhd entered into the agreement with all the defendants who were competent in their respective capacity to enter into the agreement. There was no use of unauthorised Syariah Court orders, unlike the purported 2009 plaintiff's agreement, where forged powers of attorney were employed. This fact was known to the plaintiffs in 2011 before they filed this suit against the defendants in 2013. What was more telling to us is that when the defendants entered into the 2009 plaintiff's agreement with the plaintiffs, they only had a

letter of offer which expressly contained para 4 which prohibited any kind of dealing with the said land. As compared with the Bameda Plantations agreement entered into between parties on 5 June 2012, it was entered into after the title had been issued in respect to the land to all the defendants on 1 June 2012. In other words, the Bameda Plantations agreement did not suffer from any defect which may have tainted it in any way so as to deny it of its bona fides. In light of the above scenario, it was clear to us, on balance, where the better equity had tilted in favour of. Definitely, it was not on the side of the plaintiffs. They were dealing with a piece of land which they knew was not allowed to be dealt with in any way by the state authority, as per the letter of offer to the defendants. They could not be heard to seek for an equitable relief when in fact their hands were less than clean. As is trite, the courts will not assist such litigants.

[32] As a conclusion, we were unanimous in our view that this appeal be dismissed with costs. The grounds provided by the learned High Court judge were legally sound and he was correct on his findings of facts. He had not been plainly wrong such that we must intervene in order to right a plainly wrong decision. This had not been such a case. We therefore had affirmed his whole decision. We also had awarded costs of RM10,000 to the defendants/respondents subject to allocator. Deposit was refunded to the plaintiffs, being the appellants.

Decision of High Court judge affirmed; appeal dismissed with costs of RM10,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar